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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 499

GREAT NORTHERN RAILWAY COMPANY,
PETITIONER,

vs.

P. B. SULLIVAN, DOING BUSINESS AS ALBERTA
COAL SALES COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 26, 1934.

CERTIORARI GRANTED DECEMBER 3, 1934.

SUPREME COURT OF THE UNITED STATES

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[fol. a] [Captions omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, THIRD DIVISION

P. B. Sullivan, Doing Business as Alberta Coal Sales Company, Plaintiff,

vs.

Great Northern Railway Company, Defendant

Complaint—Filed April 22, 1931

Plaintiff complains of defendant and alleges that:

I

During the times herein mentioned, plaintiff was, and still is, a sole trader doing business as Alberta Coal Sales Company and engaged generally in the business of wholesaling coal.

II

During the times herein mentioned, defendant was, and still is (a) a common carrier engaged in the transportation of property wholly by railroad in interstate commerce; and in commerce between points in Canada and points in the United States; and in commerce between points on the international boundary line between the United States and Canada and points in the United States; and (b) as such common carrier, subject to the provisions of the Act to [fol. 2] Regulate Commerce, approved February 4th, 1887, and acts amendatory thereof and supplemental thereto.

III

At all the times hereinafter mentioned, the railroads of defendant and its common connecting carriers, constituted a continuous line of railroad and a through route for the transportation of freight from various coal originating points in the province of Alberta, Canada, including Kipp, Tabor, Occidental, Lethbridge, Kneehill and Drumheller, to points on defendant's railroad in North Dakota and Min-

nesota; that said defendant at all said times had, and still has, traffic arrangements with common carriers, subject to Act to Regulate Commerce at various stations and places along the line of its railroad, and particularly at points where its railroad reaches the international boundary in Minnesota and North Dakota, said international boundary points being junction points between defendant's railroad and railroads engaged as common carriers in the Dominion of Canada; and that said defendant at all times both received and handled, and still receives and handles, traffic including coal from its said connections at various points including the junction points aforesaid.

IV

During 1925, 1926, 1927, 1928, plaintiff shipped, or caused to be shipped, from the originating points generally described in section III of this complaint to various destinations on defendant's railroad in North Dakota and Minnesota, (including those set forth in Exhibit "B" attached hereto and made a part hereof), numerous carloads of coal; that for the transportation of said shipments by defendant from the international boundary junction points where defendant received said shipments, defendant charged, collected and received from plaintiff the several rates and charges duly published and filed by defendant with the Interstate Commerce Commission, and on file with said Commission at the time each of said shipments were so transported in defendant's several lawfully published, filed and applicable tariffs including those referred to in Exhibit "B" aforesaid; that the rates so published and filed and so charged, collected and received, and paid by plaintiff for said transportation on each of said shipments of coal in carloads, were, when said rates and charges were exacted by defendant and paid by plaintiff, unjust, unreasonable, arbitrary, confiscatory and unlawful in violation of section I of said Act to Regulate Commerce.

V

[fol. 3] On or about August 15, 1927, plaintiff duly commenced a proceeding against defendant before the Interstate Commerce Commission, which, under the Act to Regulate Commerce and acts amendatory thereof and supple-

mental thereto, had jurisdiction in that behalf over the parties and subject matter in said proceeding, by filing its petition with said Interstate Commerce Commission in which plaintiff set forth the facts substantially as hereinabove set forth, complaining of the aforesaid alleged violations of the Act to Regulate Commerce and praying that the defendant above named might be required to answer the charges therein contained; that after due hearing and investigation, an order be made commanding the said defendant to cease and desist from the aforesaid violations of the Act to Regulate Commerce and pay the plaintiff herein by way of reparation for the unlawful charges hereinbefore described such sum as, in view of the evidence to be adduced therein, the Commission might consider the plaintiff is entitled to, and that such order or further order or orders might be made as the Commission might consider proper in the premises and that plaintiff's cause might appear to require; that plaintiff will produce and offer said complaint in evidence at the trial of this action; that said proceeding before the Interstate Commerce Commission was known and designated on the dockets of said Commission as "Alberta Coal Sales Company et al. vs. Canadian National Railways et al.," Interstate Commerce Commission Docket No. 19997; that a copy of the complaint and supplemental complaint in said proceeding together with the several exhibits attached to said complaint and supplemental complaint was duly served upon and received by defendant, and defendant is hereby referred to said complaint and supplemental complaint and the exhibits thereto attached for information respecting the allegations and contents thereof, and said complaint and supplemental complaint together with the exhibits severally attached thereto are hereby, by reference, incorporated herein and made a part hereof.

VI

After the filing of said complaint with said Interstate Commerce Commission and the due service of the said complaint upon defendant, the defendant herein duly answered the same, and said proceeding being at issue upon complaint and answer on file with the Interstate Commerce Commission, a hearing was thereafter duly had upon the

[fol. 4] issues raised by said complaint and answer, and having been duly heard and submitted by the parties thereto, and full investigation of the matters and issues involved therein having been had, the Commission did, on or about the 12th day of May, 1930, by an order made on said day, authorize and order the defendant herein to pay the plaintiff on or before June 26th, 1930, the sum of Three Thousand, Nine Hundred Ninety and 20/100 Dollars ($3,990.20), with interest thereon at the rate of six per cent (6%) per annum from the respective dates of payment of the freight charges upon the several shipments made by plaintiff, as reparation for damages caused by applying and collecting said unjust, unreasonable and inapplicable rates charged for the transportation of said carload shipments of coal hereinbefore referred to; that said order was duly served upon the defendant and a copy thereof is hereto attached, made a part hereof, and entitled Plaintiff's Exhibit "A."

VII

The defendant has refused and neglected and still refuses and neglects to pay said plaintiff any part of said sum of Three Thousand, Nine Hundred Ninety and 20/100 Dollars ($3,990.20), and interest as provided by the terms of said order, and that the time to pay said sum in pursuance of said order has passed, and said sum with interest thereon at six per cent (6%) as provided by said order is now due and owing from defendant to plaintiff.

VIII

Wherefore, plaintiff demands judgment against defendant in the sum of Three Thousand, Nine Hundred Ninety and 20/100 Dollars ($3,990.20), with interest thereon as provided by the terms of said order, Plaintiff's exhibit "A," plus a reasonable attorney's fee, together with the costs and disbursements of this action.

Stanley B. Houck and Ormie C. Lance, Attorneys for Plaintiff, 910 McKnight Building, Minneapolis, Minnesota.

[fol. 5] EXHIBIT "A" TO COMPLAINT

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 12th day of May, A. D. 1930

No. 19997

ALBERTA COAL SALES COMPANY et al.

vs.

CANADIAN NATIONAL RAILWAYS et al.

It appearing that on May 7, 1928, the commission entered its report in the above-entitled proceeding, which report is hereby referred to and made a part hereof, and this proceeding now coming on for further consideration on the question of reparation, and the parties having filed agreed statements with respect to the shipments in question, showing, among other things, the dates on which payment of the charges assailed was made; we find that complainants and intervener shown in the following table are entitled to awards of reparation from the defendants named below in the amounts set opposite their respective names, with interest.

Complainants	Defendants	Amounts
Alberta Coal Sales Company	G. N.	$3,990.20
Do.	Soo. and G. N.	284.05
Do.	N. P.	168.01
Do.	Soo.	2,518.91
Do.	Soo. and N. P.	83.75
Do.	Soo. and G. F. & S. C.	40.69
Do.	Soo. and Mid. Cont.	51.20
Piper-Howe Lumber Company	Soo.	496.72
Intervener	**Defendants**	**Amounts**
Monarch Elevator Company	N. P.	$49.15
Do.	G. N.	171.72

It is therefore ordered that the defendants named in each of the groups shown in the above table be, and they are hereby, authorized and directed to pay unto the complainants and intervener shown opposite said groups, on or before June 26, 1930, the amounts set opposite their respective names in said table, with interest thereon at the rate of

six per cent per annum from the respective dates of payment of the charges assailed shown in the aforesaid agreed statements, as reparation on account of unreasonable rate charged for the transportation of numerous carloads of [fol. 6] lignite and bituminous coal from Province of Alberta, Canada, to destinations in North Dakota and Minnesota.

By the Commission.

(Seal.) George B. McGinty, Secretary.

Index of Abbreviations

FG&SC	Farmers Grain & Shipping Company.
Gn	Great Northern Railway Company.
NP	Northern Pacific Railway Company.
Mid. Cont.	Midland Continental Railroad.
Soo.	Minneapolis, St. Paul & Sault Ste. Marie Railway Company.

[File endorsement omitted.]

In United States District Court

Answer—Filed May 13, 1931

Defendant for its answer to the complaint in the above entitled case:

I

Admits the allegations contained in paragraphs 1 and 2 thereof.

II

Admits that at all times mentioned in the complaint the railroads of defendant and its connecting common carriers constituted a continuous line of railroad and a through route for the transportation of freight from various points in the Province of Alberta, Canada, to points on defendant's railroad in North Dakota and Minnesota, and that at all times mentioned in the complaint the defendant received and handled traffic, including coal, from the international boundary between the United States and the Dominion of Canada to destinations on defendant's railroad in North

Dakota and Minnesota, including traffic which originated at points in the Province of Alberta, Canada.

III

Admits that, during the years 1925, 1926, 1927 and 1928, plaintiff shipped or caused to be shipped from points of origin in the Province of Alberta, Canada, to destinations on defendant's railroad in North Dakota and Minnesota, [fol. 7] certain car loads of coal and that the defendant collected and received from the plaintiff, for the transportation of said shipments of coal through rates equal to the sums of the several rates duly published by the defendant and the connecting common carriers. Denies that the rates so published by said connecting common carriers and by defendant, and so charged, collected and received by defendant and paid by the plaintiff for said transportation were, when said rates and charges were exacted by the defendant and paid by plaintiff, unjust, unreasonable, arbitrary, confiscatory or otherwise unlawful, in violation of Section 1 of the Act to Regulate Commerce.

IV

Admits that on or about August 15, 1927, plaintiff, doing business as Alberta Coal Sales Company, duly commenced a proceeding against the defendant and other common carriers by rail, including said connecting common carriers, in which said Alberta Coal Sales Company attacked those portions or factors of the said through rates from points in the Province of Alberta to destinations in North Dakota and Minnesota that were applicable from said international boundary to said destinations, said proceeding being known as I. C. C. Docket No. 1997, Alberta Coal Sales Company et al. vs. Canadian National Railways et al.

V

Admits that on or about May 12, 1930, the Interstate Commerce Commission made and entered an order in said proceeding authorizing and directing the defendant herein to pay the plaintiff herein on or before June 26, 1930, the sum of $3,990.20, with interest thereon at the rate of 6% per annum from the respective dates of payment of the freight charges upon the several shipments made by plaintiff and that said order was duly served upon the defendant.

VI

Except as herein specifically admitted defendant denies each and every allegation, matter of fact and thing contained in said complaint.

VII

Further answering, defendant alleges that said carloads of coal shipped by plaintiff from points of origin in the Province of Alberta to destinations on defendant's line in North Dakota and Minnesota were handled by said connecting lines and by defendant as through shipments from the point of origin in the Province of Alberta to the destination [fol. 8] in North Dakota or Minnesota under a common arrangement between such lines for a continuous carriage.

VIII

Defendant further alleges that the several rates on coal published by the said connecting common carriers from said points of origin in the Province of Alberta to the said international boundary and the several rates published by the defendant from said international boundary to said destinations in North Dakota and Minnesota were what are commonly known as proportional rates and were applicable, respectively, only on shipments that originated at points other than said international boundary and were destined to points other than said international boundary.

IX

Defendant further alleges that the charges collected by defendant for the transportation of said coal from points of origin in the Province of Alberta to destinations in North Dakota and Minnesota were computed by the use of said through rates based on the sum of the said proportional rates to and from the said international boundary.

X

Defendant further alleges that there was no evidence before the Interstate Commerce Commission in the proceeding entitled "Alberta Coal Sales Company vs. Canadian National Railways et al." to support the findings of fact made by the Commission therein; that said findings of fact

were not sufficient, in law, to support the order made by the Commission upon which this action is based, and the Commission had no authority in law to enter said order.

Wherefore, defendant prays that the complaint herein be dismissed and that defendant have its costs and disbursements.

R. J. Hagman, J. P. Plunkett, Attorneys for Defendant, 1120 Great Northern Building, St. Paul, Minnesota.

Dated May 12, 1931.

[File endorsement omitted.]

[fol. 9] IN UNITED STATES DISTRICT COURT

REPLY—Filed May 19, 1931

Plaintiff for its reply to the answer of the above named defendant in the above entitled action:

I

Denies each allegation of said answer, save and except the allegations thereof which admit the allegations of plaintiff's complaint.

II

Wherefore, plaintiff prays judgment against defendant as prayed for in its complaint.

Dated May 16, 1931.

Stanley B. Houck & Ormie C. Lance, Attorneys for Plaintiff, 910 McKnight Building, Minneapolis, Minnesota.

[File endorsement omitted.]

In United States District Court

Stipulation Waiving Jury—Filed May 23, 1932

We, the attorneys for the respective parties, hereby waive the trial to the jury of this cause and agree to submit the same to the court without the intervention of a jury.

Dated May 19th, 1932.

Stanley B. Houck, Attorney for Plaintiff. J. P. Plunkett, Attorney for Defendant.

[File endorsement omitted.]

In United States District Court

Minute Entry of Trial—Sept. 21, 1932

Before Judge Joyce.

The above entitled action came on this day to be tried to the Court, trial by jury having been expressly waived by stipulation filed herein; Mr. Stanley B. Houck appearing as attorney for the plaintiff and Mr. J. P. Plunkett appearing as attorney for the defendant.

[fol. 10] Mr. Plunkett argues the case to the Court on behalf of the defendant.

Mr. Houck argues the case to the Court on behalf of the plaintiff.

Mr. Plunkett further argues the case to the Court on behalf of the defendant, and moves for judgment in favor of the defendant on the ground that there was no substantial evidence of record to support any other conclusion than that defendant was entitled to judgment. (No ruling.)

Said action is submitted to and taken under advisement by the Court.

In United States District Court, District of Minnesota, Third Division

P. B. Sullivan, Doing Business as Alberta Coal Sales Company, Plaintiff,

vs.

Great Northern Railway Company, Defendant

Judgment—July 27, 1933

This matter came on to be heard before the court on September 21, 1932, at St. Paul, Minnesota, a jury trial having been waived by stipulation. Mr. Stanley B. Houck represented the plaintiff and Mr. J. P. Plunkett represented the defendant. The case was tried upon an agreed statement of facts, which the court adopts and makes a part of its finding herein. Arguments were made, briefs filed and considered, and the court concludes as a matter of law, and it is

Ordered, that the plaintiff is entitled to and have judgment against the defendant in the amount of Three Thousand Nine Hundred Ninety and 20/100 Dollars ($3,990.20) with interest from May 12, 1930, at six per cent per annum [fol. 11] to the date of payment. A memorandum incorporating the views upon which the foregoing conclusion is reached is hereto attached and made a part hereof.

To all of which the defendant is accorded an exception.

Dated at St. Paul, Minnesota, July 27, 1933.

Matthew M. Joyce, United States District Judge.

Memorandum

The statement of facts makes unnecessary any detailed repetition of the evidence whereby the present action arises. Briefly, the plaintiff filed its complaint before the Interstate Commerce Commission in Docket No. 19997, which was submitted February 3, 1928, and decided May 7, 1928, involving an attack on certain rates on carload lots of lignite coal from international border points in Minnesota and

North Dakota to destinations in those states, applying only on coal originating in Canada. These rates were attacked as being unreasonable in violation of Section 1 of the Interstate Commerce Act. The Commission found in accordance with the prayer of the complaint, prescribed a scale of rates for the future and awarded reparation, which the defendant has failed to pay. The case is here under the provisions of Section 16 of the Interstate Commerce Act, plaintiff seeking to recover upon the amount of the award with interest allowed by the order of the Commission.

The question here presented is as to whether or not the findings of fact made by the Commission are sufficient in law to support its order awarding damages to the plaintiff.

The through rate under which the traffic moved consisted of a proportional rate from point of origin in Canada to the border, applicable only on shipments destined to points southerly of the border, combined with another proportional rate from the border point to the point of destination applicable only on shipments originating north of the border. The Canadian rate represented the share of the total rate received by the Canadian carrier and the American rate represented the share received by the American carrier, the defendant herein.

It is to be noted that the Commission made no finding that the through rates from the origins in Alberta to destinations in North Dakota were unjust and unreasonable, although it [fol. 12] had power to determine the reasonableness of such a rate but lacked power under the provisions of the Act to prescribe or to regulate such rates. Lewis, etc. vs. Southern Pacific, 283 U. S. 654. With reference to the power of the Commission in that connection the court said:

"It applies to international commerce only insofar as the transportation takes place within the United States."

What the Commission did in the case here was to find that the proportional rates from the international boundary to North Dakota destinations were unjust and unreasonable. In fact this was the case before the Commission as the complaint made no attack on the through rate. The Lewis case, supra, further states:

"The act prohibits every excessive charge, whether exacted directly or obtained by indirection, and its provisions are designed to prevent evasion of the rule that every charge

for transportation shall be just and reasonable. * * * Defendant is liable for any violation of the Act by it that caused or contributed to cause damage to plaintiff without regard to the proportion of the charges attributable to the foreign transportation or paid to the foreign carrier."

This provision of the Act, as construed by the Supreme Court, places a duty on the carrier in the performance of service to establish just and reasonable rates for whatever that service may be. Here the service the rates for which are complained of as being a violation of law was that performed from the Canadian border to destination points in the two states mentioned. It cannot be questioned that the Interstate Commerce Commission, under the Act as construed by the Supreme Court, possesses jurisdiction to pass on the rates so promulgated for the service so performed. So that we have a service from the border down, over which the Commission possesses authority to determine the reasonableness of the rates therefor, and that is what was done in this case; and while the Supreme Court in News Syndicate vs. New York Central, 275 U. S. 179, uses the language, "had the through rate been just and reasonable, no damages would have resulted to plaintiff in error," it does not seem to me to be in conflict with the finding here, because in that case the defendant had failed to publish charges from point of origin to the international boundary and from the boundary point to destination. There might be no way to determine as to a violation of the Act except by determining the reasonableness of the through charge. The News Syndicate case also states with reference to the application of Section 16:

[fol. 13] "And it was the duty of the Commission to ascertain the damages sustained. It is obvious that in the ascertainment of damages, the Commission had jurisdiction to determine the reasonableness of the charges exacted."

I am of the opinion that the duty existed on the part of the carrier to have its proportional rate from the border to destination just and reasonable, and if they failed so to do the one aggrieved could avail himself of the remedies provided by the Act. In my judgment the Commission had full authority to determine the reasonableness of the rate from

the border to destination. Such a rate must of necessity under the law be published. It constituted a tariff charge which the Commission has found to be unreasonable and for which wrong, it has, as I see it, properly awarded reparation, there being a sufficient basis for such an award and a proper foundation existing for the maintenance of the proceedings herein.

Wherefore, in accordance with said Order and Memorandum, it is by the Court considered, ordered and adjudged that the plaintiff herein, P. B. Sullivan, doing business as Alberta Coal Sales Company, do have and recover of and from the defendant herein, Great Northern Railway Company, the sum of Three Thousand Nine Hundred Ninety and 20/100 Dollars ($3,990.20) with interest from May 12, 1930, at six per cent per annum to the date of payment.

It is further ordered that a stay of forty-two days from this date of all proceeding excepting the entry of judgment be and the same hereby is granted said defendant within which time it may make a motion for a new trial or take such steps in the premises as it may be advised.

[fol. 14] IN UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, THIRD DIVISION

[Title omitted]

STIPULATION FOR CORRECTION OF JUDGMENT

The undersigned attorneys for the parties to the above entitled action stipulate and agree as follows:

(1) That in lieu of the judgment in favor of plaintiff and against defendant in the amount of Thirty-nine Hundred Ninety and 20/100 Dollars ($3,990.20) heretofore entered in this proceeding there shall be substituted for said judgment judgment in the amount of Forty-seven Hundred Fifty-three and 62/100 Dollars ($4,753.62), together with interest at the rate of six per cent per annum on Thirty-nine Hundred Ninety and 20/100 Dollars ($3,990.20) from May 12, 1930, to the date of payment of said judgment and interest at the rate of six per cent per annum on Seven

Hundred Sixty-three and 42/100 Dollars ($763.42) from the date hereof to the date of payment of said judgment.

(2) That the execution of this Stipulation by defendant shall not prejudice any of defendant's rights to take an appeal from the said judgment on any grounds which would have been available to defendant had this Stipulation not been entered into.

Dated September 25, 1933.

Stanley B. Houck and Ormie C. Lance, Attorneys for Plaintiff. R. J. Hagman, J. P. Plunkett, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER CORRECTING JUDGMENT

Upon the foregoing stipulation the Clerk of the above named Court is hereby directed forthwith to substitute for the judgment heretofore entered in the above entitled action pursuant to an order of this Court heretofore made a judgment in favor of plaintiff and against defendant in the amount of Forty-seven Hundred Fifty-three and 62/100 Dollars ($4,753.62), together with interest at the rate of [fol. 15] six per cent per annum on Thirty-nine Hundred Ninety and 20/100 Dollars ($3,990.20) from May 12, 1930, to the date of payment of said judgment and interest on Seven Hundred Sixty-three and 42/100 Dollars ($763.42) at the rate of 6 per cent per annum from the date hereof to the date of payment of said judgment, and said order for judgment heretofore made is hereby amended and modified in conformity herewith.

Robert C. Bell, Judge.

Dated September 25th, 1933.

Wherefore, in accordance with said stipulation and order, it is by the Court considered, ordered and adjudged that the plaintiff herein, P. B. Sullivan, doing business as Alberta Coal Sales Company, do have and recover of and

from the defendant, Great Northern Railway Company, said sum of $4753.62, together with interest at the rate of 6% per annum on $3990.20 from May 12, 1930, to the date of payment of said judgment, and interest on $763.42 at the rate of 6% per annum from the date hereof to the date of payment of said judgment.

It is further ordered that a stay of forty-two days from this date of all proceedings excepting the entry of judgment and judgment for costs, be and the same hereby is granted said defendant within which time it may make a motion for a new trial or take such steps in the premises as it may be advised.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed Sept. 25, 1933

To the Honorable Matthew M. Joyce, District Judge:

The above named defendant feeling aggrieved by the judgment rendered and entered in the above entitled cause on July 27, 1933, as amended by the judgment entered September 25, 1933, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons set forth in the Assignment of Errors filed herewith, and it prays that an appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said judgment was based, duly authenticated, be sent to the said Circuit Court of Appeals under the rules of said Court in such case made and provided, and the petitioner further states that plaintiff has waived both cost and supersedeas bond, which waiver is [fol. 16] attached hereto, and prays that this appeal be allowed without bond.

R. J. Hagman, J. P. Plunkett, Attorneys for Defendant, 1120 Great Northern Building, St. Paul, Minnesota.

Dated September 25, 1933.

WAIVER OF COST AND SUPERSEDEAS BOND AND CONSENT TO STAY

Now comes the plaintiff above named, by and through its attorneys of record, and waives both cost and a supersedeas bond on any appeal taken by the defendant from the judgment entered herein, and consents to the making of an order allowing an appeal by the defendant without either a cost or supersedeas bond, and providing that all proceedings herein be stayed to the same extent as if a supersedeas bond had been filed and approved.

Dated September 25th, 1933.

Stanley B. Houck and Ormie C. Lance, Attorneys for Plaintiff, 910 McKnight Building, Minneapolis, Minnesota.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed Sept. 27, 1933

Upon motion of Messrs. R. J. Hagman and J. P. Plunkett, attorneys for defendant, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment heretofore filed and entered herein be, and the same hereby is, allowed, and that a certified transcript of the record, exhibits, stipulations, and all proceedings be forthwith transmitted to said Circuit Court of Appeals.

It is further ordered that said appeal is allowed without either a cost or supersedeas bond, and that all proceedings [fol. 17] herein be stayed in the same manner and to the same extent as if such bonds had been filed and approved.

By the Court:

Matthew M. Joyce, Judge.

Dated September 27th, 1933.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed Sept. 25, 1933

Now comes the Great Northern Railway Company, the defendant and appellant in the above entitled proceeding and respectfully assigns the following errors in the record and proceeding in said case:

1. The United States District Court for the District of Minnesota, Third Division, erred in failing to find as a matter of law that the findings of fact made by the Interstate Commerce Commission were not sufficient in law to support its order awarding damages to the plaintiff.

2. The said Court erred in denying defendant's motion for finding and judgment in its favor upon the ground that there was no substantial evidence of record to support any other conclusion than that defendant was entitled to judgment.

R. J. Hagman, J. P. Plunkett, Attorneys for Defendant.

Dated September 25, 1933.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PRAYER FOR REVERSAL—Filed Sept. 25, 1933

Now comes the Great Northern Railway Company, the defendant in the above entitled proceeding, and respectfully prays that for the errors assigned and filed herewith, the judgment of the United States District Court for the District of Minnesota, Third Division, entered herein on the 27th day of July, 1933, as amended by judgment entered September 25, 1933, in favor of the plaintiff, P. B. Sullivan, doing business as Alberta Coal Sales Company, and against the defendant, Great Northern Railway Company, in the sum of Forty-seven Hundred Fifty-three and 62/100 [fol. 18] Dollars ($4753.62) be reversed and a judgment

rendered in favor of the said Great Northern Railway Company and for its costs.

Dated this 25th day of September, 1933.

R. J. Hagman, J. P. Plunkett, Attorneys for Defendant, 1120 Great Northern Building, St. Paul, Minnesota.

Service of the within prayer for reversal admitted at ——, Minn., this — day of September, 1933.

Stanley B. Houck & Ormie C. Lance, Attorneys for Plaintiff.

[File endorsement omitted.]

In United States District Court, District of Minnesota, Third Division

P. B. Sullivan, Doing Business as Alberta Coal Sales Company, Plaintiff,

vs.

Great Northern Railway Company, Defendant

Bill of Exceptions—Filed Sept. 27, 1933

The above entitled cause came on for trial before Hon. Matthew M. Joyce, one of the Judges of the above-named Court on Wednesday, September 21, 1932, at 10 o'clock A. M., at the Federal Building, St. Paul, Minnesota, jury having been waived by the parties.

There were present and appearing:
Mr. Stanley B. Houck on behalf of the plaintiff.
Mr. J. P. Plunkett on behalf of the defendant.

Thereupon the following proceedings were had:

The following stipulation of facts was introduced and filed:

Stipulation of Facts

"The parties to the above entitled action, by their respective attorneys, agree as follows:

[fol. 19] I

(a) That the following statement of facts is true, and that on the trial of said action, this statement may be received in evidence and shall be competent and sufficient proof of the facts herein set forth, and that no further evidence of such facts shall be required.

(b) Each party reserves the right to object to the reception in evidence of any fact contained in the following statement on the ground that the same is irrelevant or immaterial.

(c) Each party reserves the right to offer on the trial of this action additional evidence of any fact put in issue by the pleadings.

II

During the times herein mentioned, plaintiff was, and still is, a sole trader doing business as Alberta Coal Sales Company, and as such was engaged generally in the business of wholesaling coal.

III

During the times herein mentioned, defendant was, and still is: (a) a common carrier engaged in the transportation of property wholly by railroad in interstate and foreign commerce; and in commerce between points in Canada and points in the United States; and in commerce between points on the international boundary line between the United States and Canada and points in the United States; and (b) as such common carrier was, and still is, subject to the provisions of the Act to Regulate Commerce, approved February 4, 1887, and acts amendatory thereof and supplemental thereto.

IV

At all the times hereinafter mentioned, the railroads of defendant and its connecting common carriers constituted a continuous line of railroad and a through route for the transportation of freight from various coal originating points in the Province of Alberta, Canada, to points on defendant's railroad in North Dakota; and that said defendant at all times herein mentioned, both received and handled traffic including coal from its said connection.

V.

During 1925, 1926, 1927, and 1928, plaintiff shipped, or caused to be shipped, from the originating points, more specifically set forth in Exhibit "A" attached hereto and made a part hereof under the heading "origin in Alberta," [fol. 20] to the various destinations on defendant's railroad in North Dakota, more specifically set forth in the column of said exhibit entitled "Destination in North Dakota," numerous carloads of coal, a more specific description of which is set forth in the several columns of said exhibit. Said shipments of coal were transported by defendant and its connecting common carriers from the several points of origin in the Province of Alberta to the several destinations in the State of North Dakota in accordance with the terms of bills of lading executed at the several points of origin. For the transportation of said shipments defendant charged, collected and received from the plaintiff the charges set forth in the column of said exhibit entitled "Total freight charges." Said freight charges were computed by applying to the weight of said shipments, shown in the column of said exhibit entitled "Weight," the sum of the rate shown in the columns of said exhibit entitled, respectively, "Rate to border," and "Rate from border." Rates shown in the column headed "Rate to border" were duly published by the Canadian Pacific Railway Company, a common carrier by railroad operating in the Dominion of Canada, and filed with the Board of Railway Commissioners for Canada, and filed with the Board of Railway Commissioners for Canada, and with the Interstate Commerce Commission. Said rates were what are commonly known as "proportional rates" to the international boundary between the United States and Canada applicable only on shipments destined to stations in the United States beyond said boundary. Rates shown in the column headed "Rate from border" were duly published by the defendant and filed with the Interstate Commerce Commission. Said rates were proportional rates from the international boundary applicable only on shipments originating in the Province of Alberta. The freight charges applicable to that portion of the haul from the point of origin to the international boundary were paid by the defendant to its connecting common carriers operating north of said boundary. Said Exhibit "A", so incorporated herein and made

a part hereof, in its several columns reading from left to right of said exhibit, sets forth: (1) the date when each of said shipments was made at the originating point in Alberta, Canada; (2) the date when each of said shipments was delivered at the destination after the completion of their transportation; (3) the date when charges upon each of said shipments was paid; (4) the initial and number of the car in which each of said shipments was made; (5) the point in Alberta, Canada, where each of said shipments originated and from which it was shipped; (6) the destina- [fol. 21] tion in North Dakota to which each of said shipments was destined; (7) the route over which each of said shipments was transported between origin and destination points and the gateway at the international boundary at which each of said shipments entered the United States; (8) the distance from the origin point to the international boundary; (9) the distance from the international boundary to the destination; (10) the total distance between the point of origin and the destination; (11) the weight of each of said shipments; (12) the proportional rate from the point of origin to the international boundary; (13) the proportional rate from the international boundary to the destination; (14) the total through rate, which is the sum of the rates shown in columns (12) and (13); (15) the freight charges collected on that portion of the haul from the point of origin to the international boundary; (16) the freight charges collected on that portion of the haul from the international boundary to the destination; (17) the total freight charges collected for the haul from the point of origin to the destination, being the sum of the freight charges shown in columns (15) and (16); (18) the rate from the international boundary to the destination found reasonable by the Interstate Commerce Commission; (19) the freight charges applicable to the haul from the international boundary to the destination computed at the rates found reasonable by the Interstate Commerce Commission; (20) the amount of reparation, without interest, awarded by the Interstate Commerce Commission, being the difference between the freight charges shown in column (16) and those shown in column (19).

VI

On or about August 15, 1927, plaintiff duly commenced a proceeding against defendant before the Interstate Com-

merce Commission by filing its petition with said Interstate Commerce Commission in which plaintiff set forth the facts substantially as hereinabove set forth, and alleged that the rates and charges collected for that portion of the haul from the international boundary to the destinations were unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act, and prayed that the defendant be required to pay to the plaintiff by way of reparation for the unlawful charges alleged to have been collected, such sum as said Interstate Commerce Commission should determine was due the plaintiff. Said proceeding before the Interstate Commerce Commission was known and designated on the dockets of said Commission as "Alberta [fol. 22] Coal Sales Company et al. versus Canadian National Railways et al., Interstate Commerce Commission Docket No. 19997." A copy of the complaint and supplemental complaints in said proceeding, together with the several exhibits attached to said complaint and supplemental complaints are hereto attached, incorporated herein, and made a part hereof as Exhibits "B", "C", "D", "E", "F", "G", "H" and "I".

VII

After the filing of said complaints with said Interstate Commerce Commission and the due service of said complaints upon defendant, the defendant herein duly answered the same, and the said proceeding being at issue upon complaint and answer on file with the Interstate Commerce Commission a hearing was thereafter duly had upon the issues raised by said complaint and answer. At such hearing plaintiff and defendant herein introduced oral evidence and exhibits. A transcript of the oral evidence adduced at said hearing is incorporated herein and made a part hereof as Exhibit "J". The exhibits introduced at said hearing are incorporated herein and made a part hereof as Exhibits "K-1" to "K-26", inclusive. Said transcript and exhibits set forth in Exhibits "J" and "K-1" to "K-26", inclusive, comprise all of the evidence, oral or wrtten, that was introduced at said hearing. The parties hereto having been duly heard and a full investigation of the matters and issues involved in said complaint having been had, the Commission did on or about May 7, 1928, render its decision and order in which it

found that the rates used in computing the charges collected on said shipments from the international boundary to the destinations of such shipments were unjust and unreasonable to the extent that they exceeded certain rates set forth in said decision and order. On or about May 12, 1930, the Commission by an order made on said day authorized and ordered the defendant herein to pay the plaintiff on or before June 26, 1930, the sum of three thousand nine hundred ninety and 20/100ths dollars ($3,990.20), with interest thereon at the rate of six per cent (6%) per annum from the respective dates of payment of the freight charges upon the several shipments made by plaintiff as reparation for damages caused by defendant collecting charges computed by the use of rates which said Commission in its said decision and order of May 7, 1928, found were unjust and unreasonable for the transportation of said shipments of coal hereinbefore referred to from the international boundary to said destinations. Said decision and order dated May 7, 1928, and said [fol. 23] order dated May 12, 1930, were duly served upon the defendant. A copy of said decision and order dated May 7, 1928, is attached hereto and made a part hereof, and entitled "Exhibit L". A copy of said order dated May 12, 1930, is attached hereto and made a part hereof, entitled "Exhibit M".

VIII

The defendant has refused and still refuses to pay plaintiff any part of said sum of three thousand nine hundred ninety and 20/100ths dollars ($3,990.20), and interest, as provided by the terms of said order of May 12, 1930, the time to pay said sum in pursuance of said order has passed and said sum, with interest thereon at six per cent (6%) per annum as provided by said order, is now due and owing from defendant to plaintiff, if plaintiff is entitled to recover anything under his complaint."

Thereupon Mr. Plunkett argued the case to the Court on behalf of the defendant and Mr. Houck argued the case on behalf of the plaintiff.

Motion of Defendant for Judgment

Thereupon Mr. Plunkett moved the Court for judgment in favor of the defendant on the ground that there was no substantial evidence of record to support any other conclusion than that defendant was entitled to judgment.

Exhibit "A"

Excerpts from claim of the Alberta Coal Sales Company under Decision of the Interstate Commerce Commission in Docket 19997—Canadian Lignite Coal.

Origin in Alberta	Destination in North Dakota	Distance to International Border	Distance from International Border	Rate to Border	Rate from Border
Drumheller	Sarles	627	293.1	$3.30	$3.50
Drumheller	Antler	627	218.9	3.30	2.90
Taber	Appam	521	158.5	3.30	2.40
Kipp	Aye	560	277.4	3.30	3.35
Kipp	Pantry	560	134.	3.30	2.15
Kipp	Barton	560	151.5	3.30	2.40

[fol. 24]

Exhibit "B"

Complaint

Before the Interstate Commerce Commission

Alberta Coal Sales Company, Piper-Howe Lumber Company, Complainants,

vs.

Canadian National Railways (Lines Port Arthur, Armstrong, Ont., and West Thereof), Canadian Pacific Railway, Farmers Grain & Shipping Company, Great Northern Railway Company, Midland Continental Railroad, Midland Railway Company of Manitoba, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Northern Pacific Railway Company, Defendants

The complaint of the above-named complainants respectfully shows:

I

That the Alberta Coal Sales Company is a firm owned and operated by Patrick B. Sullivan for the purpose of buying, selling, and distribution of coal and fuel of all kinds, maintaining headquarters at Devils Lake, North Dakota; that the Piper-Howe Lumber Company is a corporation, existing under and by virtue of the laws of the State of Minnesota, with headquarters at Minot, North Dakota, and is engaged in the wholesale and retail distribution of coal and other fuels, lumber and building materials, operating branch yards in the states of North Dakota and Montana.

II

That the defendants above named are common carriers engaged in the transportation of property, wholly by railroad between points in the Dominion of Canada and points in the States of North Dakota and Minnesota, and as such common carriers are subject to the provisions of the Interstate Commerce Act.

III

That the Alberta Coal Sales Company bought and sold what is commonly shown as Lignite Coal in carloads which originated at mines at Kipp and Taber, the Province of Alberta in the Dominion of Canada and sold same F. O. B. destination to retailers and other consumers of coal at various points in the States of North Dakota and Minnesota as more specifically described in Appendices "A" to "W" inclusive, attached hereto and made a part hereof.

[fol. 25] IV

That the Piper-Howe Lumber Company purchased eighteen carloads of Lignite Coal from Lethbridge and Drumheller (Kneehill) in the Province of Alberta in the Dominion of Canada, all of which were brought F. O. B. mines and shipped to, and sold at retail from the branch yards of the Piper-Howe Lumber Company in the State of North Dakota. That the eighteen shipments referred to are more specifically described in Appendix "X" and "Y" attached hereto and made a part hereof.

V

That there are no joint through rates in effect on Lignite Coal from Canadian mines on the lines of the Canadian

National or Canadian Pacific Railways, to points in North Dakota or Minnesota beyond the International Boundary junctions in North Dakota and Minnesota at the present time nor were there any joint through rates in effect at the time of the shipments described in Appendices "A" to "Y" inclusive. That freight charges on all shipments herein complained of, were assessed on basis of combination of proportional rates to and from the several International Boundary junctions, viz.: Neche, Pembina, or Portal, North Dakota and Noyes, Minnesota, when originated by the Canadian Pacific Railway and Northgate, N. D., or Emerson, Manitoba, when originated by the Canadian National. That the rates from Canadian mines to the International Boundary points named are carried in Canadian National Tariff No. 260-B, C. R. C. No. W-487 and Canadian Pacific Tariff No. W-5379, I. C. C. No. W-723. That the factors up to the International Boundary points are not herein attacked as being in violation of the Interstate Commerce Act, the entire complaint being directed at the level of the rates maintained by certain defendants from the several International Boundary junctions to North Dakota and Minnesota destinations.

VI

That the rates assessed and collected by delivering carriers to destinations on the Great Northern and to points on the Farmers Grain and Shipping Company applied proportionally from Northgate (N. D. or Sask.), International Boundary (north of St. John, N. D.), International Boundary (north of Neche, N. D.) Noyes, Minnesota, or International Boundary (north of Noyes, Minn.) as published in Great Northern I. C. C. No. A-5681, G. F. O. No. 435-G, Item 31.

[fol. 26]

VII

That on shipments destined to points on the Minneapolis, St. Paul & Sault Ste. Marie Railway hereinafter called the Soo Line and to points on the Midland Continental, the rates from the border applied proportionally from Portal, N. D. and Noyes, Minn., as published in Soo Line I. C. C. 5359 and 6085, G. F. D. Nos. 29750 and 33660 respectively.

VIII

The rates on Canadian coal to points on the Northern Pacific in North Dakota and Minnesota from the border points, applied proportionally from Pembina, N. D., as published in N. P. I. C. C. No. 8116, Tariff No. 228-K, Item 30 and from Portal, N. D. and Noyes, Minn., combination rates as published in Soo Line I. C. C. No. 5359, G. F. D. No. 29750 and N. P. I. C. C. No. 8116, Tariff No. 228-K .

IX

That the routes of movement of the shipments which have already moved are described on the Appendices attached hereto and made a part hereof.

X

That the rates and charges assessed by defendants for the transportation of Lignite Coal from the various International Boundary junctions to destinations in North Dakota and Minnesota on the lines of defendants were and still are obviously unjust and unreasonable in violation of Section I of the Interstate Commerce Act when due consideration is given to the level of rates applicable on the same shipments from originating mines in Canada, up to the International Boundary junctions with the United States lines and, also, to the level of rates applicable on Lignite Coal in effect at the present time and at the time of the movement of the shipments described in the attached appendices, between points in North Dakota on either interstate or intrastate traffic or on interstate traffic from the several International Boundary junctions to points in Minnesota, as published and collected by defendants and as authorized in N. P. I. C. C. 8097 and N. P. I. C. C. 8365, Tariff No. 3881-A.

XI

That the rate factors applicable from the various International Boundary junctions to destinations on the lines of defendants herein have been increased since January 1, 1910, having been subjected to the general advances in rates made in 1918 and 1920.

[fol. 27] XII

That the complainants herein paid and bore the freight charges for their respective shipments as specifically described in the attached Appendices.

XIII

That by reason of the facts stated in the foregoing paragraphs, complainants have been subjected to the payment of rates and charges for transportation which were, when exacted, and still are, unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act. That complainants have been and will be further damaged to the extent that the rates and charges assessed on shipments of Lignite Coal in carloads, originating at Canadian mines and applicable from the various International Boundary junctions specified in Paragraphs VI, VII and VIII to all destinations in North Dakota and Minnesota, exceeded or may exceed the rates which would have been applied to similar movements had they originated at the same International Boundary junctions.

Wherefore, complainants pray that defendants may be severally required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants (and each of them) to cease and desist from the aforesaid violations of said Act, and to establish and put in force and apply in future to the transportation of Lignite Coal in carloads originating at Canadian Mines from the various International Boundary junctions specified in paragraphs VI, VII and VIII to all destinations in North Dakota and Minnesota on the lines of defendants, in lieu of the rates and charges authorized by the tariffs referred to in paragraphs VI, VII and VIII, such other rates and charges as the Commission may deem reasonable and just and also to pay the complainants by way of reparation for the unlawful charges hereinbefore alleged such sum, as in view of the evidence to be adduced herein, the Commission shall determine that complainants are entitled to as an award of damages under the provisions of said Act for violation thereof, and for reparation upon all similar shipments which may move between the points involved during the pendency of this proceeding, down to basis of rates found reasonable by the Commission herein and that such

other and further order or orders be made as the Commission may consider proper in the premises.

[fol. 28] Dated at Minneapolis, Minnesota, this 11th day of August, 1927.

Respectfully submitted by W. E. Keller, 1645 Hennepin Avenue., Minneapolis, Minnesota, for Alberta Coal Sales Company, Devils Lake N. D. and Piper-Howe Lumber Company, Minot, N. D.

EXHIBIT "L"

Interstate Commerce Commission

No. 19997

ALBERTA COAL SALES COMPANY et al.

vs.

CANADIAN NATIONAL RAILWAYS et al.

Submitted February 3, 1928. Decided May 7, 1928

Rates on lignite or bituminous coal, in carloads, from international-border points in North Dakota and Minnesota to destinations in those States, applicable to coal originating in the Province of Alberta, Canada, found unreasonable to the extent indicated. Reparation awarded.

Wesley E. Keller for complainants.

Leavitt R. Barker, John Junell, G. W. Traer, Sr., J. S. Gilbert, P. F. Scheunemann, and John A. Maher for various interveners.

Fletcher Rockwood, A. H. Lossow, M. L. Countryman, Jr., and R. J. Hagman for defendants.

Report of the Commission

By the Commission:

Complainants, defendants, and the Truax-Traer Coal Company, intervener, have filed exceptions to the report proposed by the examiner, and the parties have been heard in oral argument. Our conclusions differ from those recommended by the examiner.

[fol. 29] By complaint filed August 15, 1927, as amended, it is alleged that the rates on "lignite" coal, in carloads, from international-border points in North Dakota and Minnesota [1] to destinations in those states, applicable only to coal originating in Canada, have been and are unjust and unreasonable, in violation of section 1 of the Interstate Commerce Act. Complainants seek reasonable rates for the future and reparation on shipments delivered within the preceding statutory period and during the pendency of this proceeding. Rates are herein stated in amounts per ton of 2,000 pounds.

The Monarch Elevator Company, Minneapolis, Minn., a dealer in coal and other commodities, filed at the hearing a petition in intervention in support of the complaint seeking reparation on its own shipments made under the rates assailed. Various coal dock companies at Duluth, Minn., and Superior, Wis., intervened in opposition to the complaint, as did the Truax-Traer Coal Company, a miner and shipper of North Dakota lignite coal.

The rates in question were established in the latter part of 1922, at the solicitation of North Dakota interests, including the chairman of the then State fuel commission, a Canadian coal operator, and the owner of the complainant Alberta Coal Sales Company, who represented to the carriers that a strike in the eastern coal fields had curtailed the supply of coal through the Lake Superior docks and created an emergency in North Dakota. The rates were first published with a time limitation, but later the limitation was removed. With unimportant exceptions, the rates have not been increased since their establishment.

The rates are based upon distance scales, applied by 10-mile blocks for distances up to 400 miles, except that the Minneapolis, St. Paul & Sault Ste. Marie, otherwise known as the Soo Line, extends its scale to 500 miles. The latter scale is graduated beyond 400 miles to distances of 410, 430, 450, 470, and 500 miles. The scales of the three principal defendants, Great Northern, Northern Pacific, and Soo Line, are identical up to 400 miles. They range from $1 at

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[1] Portal, Northgate, International Boundary north of St. John, International Boundary north of Walhalla, Neche, and Pembina, all in North Dakota, and Noyes, Minn.

10 miles to $4.35 at 400, and the Soo Line's maximum, at 500 miles, is $5.10. To some destinations, however, it appears that the rates from the border are combinations upon an intermediate point or points and therefore are higher than if made upon the straight scale.

The coal originates at mines in the Province of Alberta, Canada. A recapitulation of certain of complainants' ex- [fol. 30] hibits indicates an average distance of 728 miles and an average rate of $3.70 from all the mines to all the border gateways from which the rates assailed apply. Various comparisons are made between the respective hauls and rates to and from the gateways. An instance is a rate of $3 from Kipp, Alberta, to Portal, N. Dak., a distance of 535 miles, whereas beyond the gateway the like rate applies for only 240 miles, or less than half the distance in Canada. Applying the illustrations to the recapitulation, the average rate of $3.70 for an average haul of 728 miles on the Canadian side would transport a ton of the coal approximately 330 miles after the boundary is crossed.

Complainints' principal comparisons are with the scales prescribed in Holmes & Hallowell Co. vs. G. N. Ry. Co., 69 I. C. C. 11, for interstate application to anthracite and bituminous coal from Lake Superior ports to points in Minnesota, North Dakota, and South Dakota, and in Lignite Coal from North Dakota, 126 I. C. C. 243, for interstate application to lignite coal from North Dakota mines to destinations in North Dakota, South Dakota, and Minnesota. The comparisons embody many variations and need not be reviewed in detail, but all disclose that the rates assailed are materially higher than both the anthracite and bituminous scales of the Holmes & Hallowell case, and much higher than the North Dakota interstate lignite scale. Among the exhibited instances are rates from the gateways computed to range roughly 120 per cent and upward of the Holmes & Hallowell bituminous scale and 115 per cent or more of the anthracite scale. Higher ranges over the North Dakota interstate lignite scale are shown, particularly for the longer hauls. As far as the rates assailed are made on the straight scales first above mentioned the ton-mile and car-mile earnings, the latter computed upon 33.4 tons, will range respectively from 10 cents and $3.34 for 10 miles to 1.09 and 36.3 cents for 400 miles. Complainants show an average loading

of 33.4 tons. They submit some further comparisons, which we need not consider in view of our conclusion. Although no figures are shown, complainants put forward the further consideration that the interchange service at the border points manifestly entails less expense to the American carriers than does the terminal service at the Lake Superior docks or at the North Dakota lignite mines.

On their part defendants maintain, and submit tables to denote that the through combination rates from the Canadian mines to the destinations in Minnesota and North Dakota compare favorably with rates on coal for correspond- [fol. 31] ing distances from Montana, Wyoming, Minnesota, and Illinois to the same consuming territory. They contend, however, that the factors in question are in themselves reasonable. To support this contention they submit comparisons which disclose that for the shorter distances up to about 80 miles, the factors are lower than, and for greater distances compare in most instances not unfavorably with, rates on bituminous coal northbound and southbound from Sheridan and Kirby, Wyo., to stations in Wyoming and Montana. Some of the latter rates are indicated as having been found reasonable in Western Coal Rates, 80 I. C. C. 383. However, the operating conditions between Sheridan and Kirby, Wyo., and stations in Wyoming and Montana are more difficult than those from Duluth, Minn., and related Lake Superior ports to destinations in Minnesota, North Dakota and South Dakota. Western Coal Rates, 80 I. C. C. 383. It must also be borne in mind that the rates assailed are in the nature of proportional rates. A further exhibit contrasts the uniform scale upon which the rates assailed are based with the materially lower North Dakota interstate and intrastate "lignite" scales, with the materially higher "bituminous" general distance tariff scale applying between Minnesota, North Dakota, and South Dakota, and with the general distance tariff scale applicable to bituminous intrastate in North Dakota.

Defendants make the further point that the movement of the coal from the international boundary is largely over branch lines of the defendants, in contrast with the main-line hauls westward from the Lake Superior docks. It is not true of Portal, which is on the Soo Line's route to the Pacific coast. They also stress the small volume of movement, illustrated of record, in comparison with the move-

ment of coal from the Lake Superior docks and of North Dakota lignite.

The rates in question are published for application to "bituminous" coal, whereas the Canadian coal to which they are applied is asserted by complainants to be, and is billed for shipment as, "lignite". Defendants maintain that is bituminous. The record does not afford a satisfactory guide for distinguishing between the grades for transportation purposes. Webster's New International Dictionary defines "lignite" as a variety intermediate between "peat" and "bituminous" coal, especially one in which the fibre of the original wood is distinct, and this is confirmed by the record. The evidence is to the effect that the Canadian coal is of better quality than the North Dakota lignite. Price quotations shown of record are $2 per ton for [fol. 32] North Dakota lump and $4.20 to $5.50 for the Canadian lump at the mines. Both kinds will air-slack upon exposure to the weather, however, said to be a characteristic of lignite, and the Canadian coal is admitted to this country duty free pursuant to a reciprocal arrangement between the two governments respecting "lignite", whereas "bituminous" coal is subject to a duty. There is no section 6 issue in the case.

Objection to the relief sought is voiced by the intervener handling the North Dakota lignite as encouraging the competition of the Canadian coal, and by interveners handling the Lake Superior dock coal on the ground that the result will be unduly prejudicial to them. To the first objection we can only reply that we can not for that reason properly deny relief from unlawful freight rates, and to the second, that nothing is shown of record whereby undue prejudice and preference can be predicated of the relationship that will result from a reduction of the rates assailed to a reasonable level.

In determining the particular rates prescribed in Lignite Coal from North Dakota, supra, we took into account the inferior quality of the coal and gave consideration to the consequent value of the service to the shipper and the level of rates the traffic could bear without curtailment of the movement. In the Holmes & Hallowell case, on the other hand while dealing with higher-grade coals, bituminous and anthracite, we projected scales which took into account the fact that the shorter hauls were in a territory of denser population and tonnage and that the longer hauls reached

into a territory of relatively sparse population and small tonnage. Therefore, while we are persuaded by the record that the rates here in question are on an unreasonably high level, we are of opinion that neither the North Dakota lignite nor the Holmes & Hallowell bituminous scale represents the appropriate measure of maximum reasonable rates. For application to hauls primarily and principally in a territory of relatively light tonnage, in part over branch lines, and to coal of the grade and value of the Canadian product the scale should begin on a somewhat higher level than the Holmes & Hallowell bituminous scale and grade down to its level at 500 miles.

Upon all the facts of record we find that, as applied to the Canadian coal to which this proceeding relates and for both single-line and joint-line hauls, the rates assailed were, are, and for the future will be unjust and unreasonable to the extent that they have exceeded or may exceed the rates per ton of 2,000 pounds set forth in the subjoined table for [fol. 33] the respective distances shown and which we find to be the maximum reasonable rates for application to the transportation of the traffic in question:

10	miles	and	under				$0.75
20	miles	and	over	10	miles		0.85
30	"	"	"	20	"		0.95
40	"	"	"	30	"		1.05
50	"	"	"	40	"		1.15
60	"	"	"	50	"		1.25
70	"	"	"	60	"		1.35
80	"	"	"	70	"		1.44
90	"	"	"	80	"		1.52
100	"	"	"	90	"		1.60
110	"	"	"	100	"		1.68
120	"	"	"	110	"		1.76
130	"	"	"	120	"		1.84
140	"	"	"	130	"		1.92
150	"	"	"	140	"		2.00
160	"	"	"	150	"		2.06
170	"	"	"	160	"		2.12
180	"	"	"	170	"		2.18
190	"	"	"	180	"		2.24
200	"	"	"	190	"		2.30
210	"	"	"	200	"		2.36
220	"	"	"	210	"		2.42

230	"	"	"	220	"	2.48
240	"	"	"	230	"	2.54
250	"	"	"	240	"	2.60
260	"	"	"	250	"	2.66
270	"	"	"	260	"	2.72
280	"	"	"	270	"	2.78
290	"	"	"	280	"	2.84
300	"	"	"	290	"	2.90
310	"	"	"	300	"	2.96
320	"	"	"	310	".	3.01
330	"	"	"	320	"	3.07
340	"	"	"	330	"	3.12
350	"	"	"	340	"	3.18
360	"	"	"	350	"	3.23
370	"	"	"	360	"	3.29
380	"	"	"	370	"	3.34
390	"	"	"	380	"	3.40
400	"	"	"	390	"	3.45
410	"	"	"	400	"	3.50
420	"	"	"	410	"	3.55
430	"	"	"	420	"	3.60
440	"	"	"	430	"	3.65
450	"	"	"	440	"	3.70
460	"	"	"	450	"	3.75
470	"	"	"	460	"	3.80
480	"	"	"	470	"	3.85
490	"	"	"	480	"	3.90
500	"	"	"	490	"	3.95

[fol. 34] We further find that complainants and the Monarch Elevator Company, intervener, made shipments under the rates herein found unreasonable and paid or bore the charges thereon; that they were damaged thereby in the respective differences between the charges paid and those that would have accrued or would accrue at the rates herein found reasonable; and that they are respectively entitled to reparation in those amounts, with interest. They should comply with Rule V of the Rules of Practice. Shipments delivered since the hearing may be included and proof concerning payment or bearing of the charges may be submitted by affidavit, but if defendants decline to accept proof in that form the matter may be brought to our further attention by petition for further hearing respecting such shipments.

When publishing the rates herein prescribed defendants will be expected to make them applicable to the kind of coal from the Canadian mines to which they are to be applied.

An appropriate order will be entered.

BRAINERD, Commissioner, dissenting in part:

This proceeding involves rates on bituminous coal originating in the Province of Alberta and shipped over the lines of the defendant carriers to points in North Dakota and Minnesota. Through rates were constructed by combination rates to and from the International Border. The rates from the border points to destinations mentioned are found unreasonable and reparation is awarded, although there is no evidence that the through rates are unreasonable. On the contrary, they are affirmatively shown to be reasonable. A through rate may be reasonable although one of its elements is not. It is immaterial that the through rate be a combination of locals or proportionals rather than a joint rate. In the ascertainment of damages, the Commission has jurisdiction to determine the reasonableness of the through rate. The through rate being reasonable, no damage can have resulted therefrom to the complainant. News Syndicate Co. vs. N. Y. C. R. R. Co. et al., 275 U. S. 179, 187.

I therefore dissent from the award of reparation.

I am authorized to say that Commissioner Woodlock concurs in this expression of dissent.

PORTER, Commissioner, dissenting:

In 1922 when eastern coal miners were on strike and it became difficult to secure coal to supply the northwestern section of our country, coal dealers and miners petitioned [fol. 35] the American carriers to establish a basis of proportional rates on coal from Canada. Temporary rates were established, their expiration date was later extended and still later removed entirely leaving the rates in effect. For the past six years this coal has moved into North Dakota and Minnesota in competition with the better coal from the head-of-the lakes and the cheaper lignite from mines in North Dakota. The majority find that this basis of rates was, for the two years prior to the date of filing the com-

plaint, and for the future will be unreasonable in amounts for the different mileage blocks varying from 30 cents to 115 cents per ton.

The assailed rates are higher that the so-called Holmes & Hallowell scale and are considerably higher than interstate rates on North Dakota lignite fixed by us in Lignite Coal from North Dakota, 126 I. C. C. 243. The majority concede, as they must, that "neither the North Dakota lignite nor the Holmes and Hallowell bituminous scale represents the appropriate measure of maximum reasonable rates." What rates, then, do provide a standard?

It seems to me that defendants' comparison of these proportional rates with those applicable on coal from Sheridan and Kirby, Wyo., affords a fair and reasonable guide. The record shows that the assailed rates for 2-mile blocks up to 100 miles and 50-mile blocks up to 300 miles, average 215 cents per ton, as compared with similar averages from Kirby and Sheridan, northbound and southbound, respectively, of 210.9 cents and 219.4 cents. The rates here fixed by the majority will compare with northbound rates from Sheridan and Kirby as follows:

Rates

Miles	From Sheridan and Kirby (Northbound)	Here prescribed as reasonable	Assailed
20	97.5	85	115
40	157.5	105	130
60	157.5	125	155
80	170	144	165
100	190	160	190
150	197.5	200	230
200	281*	230	275
250	309.5*	260	315
300	338*	290	360

[fol. 36] It will thus be seen that not only do the assailed rates compare favorably with the rates from Sheridan and Kirby but the rates prescribed will be considerably lower, notwithstanding some of the Sheridan and Kirby rates have had our approval.

The complaint should be dismissed.

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* Rates found reasonable by us in Western Coal Rates, 80 I. C. C. 383.

Commissioner Taylor desires to be shown as joining in this dissent.

STIPULATION OF COUNSEL APPROVING BILL OF EXCEPTIONS

It is hereby stipulated that the foregoing, consisting of 16 pages of typewritten matter, constitute a full, true and correct transcript of all the evidence introduced and of all motions, rulings, and orders made and of all the exceptions taken and allowed upon the trial of the foregoing action, and that the same is in accordance with the truth and may without further notice be settled, allowed and certified as the Bill of Exceptions in said action and made a part of the record herein.

Dated this 25th day of September, 1933.

Stanley B. Houck and Ormie C. Lance, Attorneys for Plaintiff. R. J. Hagman, J. P. Plunkett, Attorneys for Defendant.

APPROVAL OF BILL OF EXCEPTIONS BY DISTRICT JUDGE

Thereupon and within the time allowed the defendant duly tendered this Bill of Exceptions herein, which having been seen and examined by the Court and counsel, and counsel having consented thereto, and it appearing to the Court that the same contains all the evidence introduced and all motions, rulings and orders made, and all exceptions taken and allowed upon the trial of the foregoing action, is hereby allowed, approved, signed, sealed and ordered to be filed and made a part of the record in this cause this 27th day of September, 1933.

By the Court:

Matthew M. Joyce, District Judge.

[fol. 37] [File endorsement omitted.]

Citation in usual form, showing service on Stanley B. Houck and Ormie C. Lance, filed Sept. 28, 1933, omitted in printing.

[fol. 38] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT—Filed Sept. 25, 1933

To the Clerk of the above entitled Court:

You will please prepare transcript of the record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit under the appeal heretofore taken by the defendant, and include in said transcript the following:

1. Complaint, including Exhibit "A" attached thereto but omitting Exhibit "B" attached thereto.
2. Answer.
3. Reply.
4. Stipulation Waiving Jury.
5. Clerk's Record of Trial.
6. Opinion of District Court.
7. Judgment.
8. Bill of Exceptions with Stipulation and Order Settling the Same.
9. Assignment of Errors.
10. Prayer for Reversal.
11. Petition for Appeal.
12. Waiver of Cost and Supersedeas Bond and Consent to Stay.
13. Order Allowing Appeal.
14. Citation on Appeal.
15. Election as to Printing.
16. This Præcipe.
17. Consent to Contents of Record.
18. Clerk's Certificate to Transcript.

Said transcript to be prepared as required by law and by the rules of the United States Circuit Court of Appeals for the Eighth Circuit.

R. J. Hagman, J. P. Plunkett, Attorneys for Defendant, 1120 Great Northern Building, St. Paul, Minnesota.

Dated September 25th, 1933.

[fols. 39 & 40] Consent to Contents of Record

Plaintiff, by and through its attorneys of record, hereby admits service of the above Præcipe, consents thereto, and

agrees that the transcript requested thereby contains all the records in this case which are material to the determination on the merits of the appeal heretofore taken by defendant.

Stanley B. Houck and Ormie C. Lance, Attorneys for Plaintiff.

Dated September 25th, 1933.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ELECTION AS TO PRINTING OF RECORD—Filed Sept. 28, 1933

The defendant in the above entitled case hereby elects to take and file in the United States Circuit Court of Appeals for the Eighth Circuit a transcript of the record herein to be printed under the supervision of the Clerk of said Court under its rules.

Dated this 25th day of September, 1933.

R. J. Hagman, J. P. Plunkett, Attorneys for Defendant, 1120 Great Northern Building, St. Paul, Minnesota.

[File endorsement omitted.]

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 41] Appearances of counsel omitted in printing.

[fol. 42] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER OF SUBMISSION—May 10, 1934

This cause having been called for hearing in its regular order, argument was commenced by Mr. J. P. Plunkett for appellant, continued by Mr. Stanley B. Houck for appellee, and concluded by Mr. J. P. Plunkett for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 43] In United States Circuit Court of Appeals, Eighth Circuit

May Term, A. D. 1934

No. 9871

Great Northern Railway Company, Appellant,

vs.

P. B. Sullivan, doing business as Alberta Coal Sales Company, Appellee

Appeal from the District Court of the United States for the District of Minnesota

Mr. J. P. Plunkett (Mr. R. J. Hagman was with him on the brief), for appellant.

Mr. Stanley B. Houck (Mr. Ormie C. Lance was with him on the brief), for appellee.

Before Gardner, Woodrough, and Van Valkenburgh, Circuit Judges.

Opinion—September 4, 1934

Gardner, Circuit Judge, delivered the opinion of the court:

Appellee as plaintiff, brought this action against appellant to recover damages by way of reparation in the sum of $3990.20, which amount had been awarded him by an order of the Interstate Commerce Commission in a proceeding entitled Alberta Coal Sales Company et al., vs. Canadian National Railways et al., Docket No. 19997. Appellee was one of the complainants in that proceeding.

[fol. 44] Appellant is a common carrier engaged in the transportation of property, including property originating at points on the Canadian Pacific Railway Company in Canada, and it was one of the defendants in said proceeding before the Interstate Commerce Commission.

We shall refer to the parties as they were designated in the lower court.

During the years 1925 to 1928, inclusive, plaintiff shipped numerous carloads of coal from points originating in the Province of Alberta, Canada, on the line of the Canadian Pacific Railway Company, to points on defendant's line of railroad in the State of North Dakota. These shipments moved from points of origin to destination on bills of lading executed at points of origin. The freight charges collected were computed by the use of a rate made up of two factors, one a proportional rate from points of origin to the international boundary, applicable only to coal destined to points beyond the boundary, and the other, a proportional rate from the international boundary to destination points in North Dakota, applicable only to coal shipments originating in Canada. The entire freight charges as published in these applicable tariffs were collected by defendant, and it in turn accounted to the Canadian line for the proportion of the charges due it.

On complaint of plaintiff alleging that the rates and charges collected for that portion of the haul from the international boundary to destination in North Dakota were unjust and unreasonable, in violation of Section 1 of the Interstate Commerce Act, the Interstate Commerce Commission, in the proceeding above referred to, found these rates to be unjust, unreasonable, and excessive to the extent that they exceeded a scale of rates set forth in the decision of the Commission, and the Commission thereupon entered an order requiring defendant to pay plaintiff damages by way of reparation in the sum of $3990.20, the damages being calculated on the basis of the difference between the published rates as collected by the defendant and the scale of rates found by the Commission to be the maximum reasonable rates applicable to the transportation of the traffic in question. Defendant having refused to comply with this order, plaintiff brought this action to recover judgment for the amount of the award, together with interest thereon.

[fol. 45] On this appeal it is contended by defendant that (1) plaintiff suffered no recoverable damage in consequence of the violation of the Interstate Commerce Act, because it was neither charged nor proven that the entire through-rate was unreasonable; and (2) that the mere fact that the

rates from the international boundary, as fixed by the published tariff of defendant, were found to be unreasonable and unjust, did not authorize the Commission to award damages for past violation, but only warranted it to forbid the use of the rate in the future because there was no finding that the through-rate was unreasonable.

As has been observed, defendant's rate from the international boundary was a proportional one, made applicable only to coal shipments originating in Canada. It was defendant's duty to publish and charge a just and reasonable rate for the transportation of plaintiff's freight from the international boundary to points in the United States. Section 1 of the Interstate Commerce Act provides that it shall apply to common carriers engaged in the transportation of property wholly by railroad from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States. The Interstate Commerce Act does not empower the Commission to prescribe or regulate a joint through international rate, but it has the power to regulate the rate over that part of the transportation which takes place within the United States. Interstate Commerce Act, 24 Stat. 379, Title 49 U. S. C. A. Sec 1, subdivisions (1), (2), and (5), and Sec. 6, subdivisions (1), (7), and (8).

The evidence introduced before the Commission is not before us, but no attack is made upon the findings of the Commission that the rates as published and charged by the defendant from the international boundary line were unreasonable and unjust. The plaintiff, therefore, violated this provision of the Interstate Commerce Act. While not disputing this violation of the Act, as found by the Commission, defendant contends that it was not only necessary to prove that it had violated the Act, but that the plaintiff had been damaged by reason of that violation.

In collecting the exorbitant freight charges on the traffic in question, defendant committed a tort, making it liable for any damage resulting therefrom, but defendant ingeniously argues that inasmuch as the Commission did not [fol. 46] find that the entire through-rate was excessive or exorbitant, it cannot be said that plaintiff has been injured. The tariff as published, established the rate in question as a proportional rate. It was applicable only as a part of the

through-rate, and as such it was found to be unjust, unreasonable, and excessive. In other words, the Commission considered this rate not as an independent rate from the international boundary to the point of destination, but as a part of the international through-rate from point of origin to point of destination. If, as argued by defendant, the rate from the point of origin to the international boundary may have been very low, still we must assume that the Commission considered the rate in question as a part of the through-rate.

The contention now made may well have been urged before the Commission, and we may presume that it was so urged. But notwithstanding that fact, the Commission found the tariff published and the rate charged and collected by the defendant pursuant thereto, unreasonable and excessive. This is not a case in which the defendant has violated the Commerce Act by failure to publish a rate from the international boundary, nor is it a case in which it has violated the Act by participating in an unreasonable joint through international rate, but it has committed a tort because it has collected the exorbitant and unreasonable rate from the international boundary as published in its tariff. Lewis, etc. Co. v. Southern Pacific Co., 283 U. S. 654; News Syndicate Co. v. New York Central R. Co., 275 U. S. 179.

This violation of the Act by the defendant has resulted in damage to the plaintiff which is measured by the difference between the unjust and unreasonable charge exacted and the maximum rate found by the Interstate Commerce Commission to be reasonable and just, with interest upon the amount of such difference. Louisville & N. R. Co. v. Sloss-Sheffield Steel & Iron Co., 269 U. S. 217.

The judgment appealed from is therefore affirmed.

[fol. 47] In United States Circuit Court of Appeals, Eighth Circuit

No. 9871

Great Northern Railway Company, Appellant,

vs.

P. B. Sullivan, Doing Business as Alberta Coal Sales Company

Judgment—September 5, 1934

Appeal from the District Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause be, and the same is hereby, affirmed with costs; and that P. B. Sullivan, doing business as Alberta Coal Sales Company, have and recover against the Great Northern Railway Company the sum of Twenty Dollars for his costs herein and have execution therefor.

September 5, 1934.

[fol. 48] In United States Circuit Court of Appeals

Petition for Order Staying Issuance of Mandate—Filed Oct. 3, 1934

To the Honorable Judges of this Court:

Your petitioner, Great Northern Railway Company, respectfully presents this, its application for an order staying the issuance of a mandate of this Court filed September 4, 1934, and in support thereof states that your petitioner, the Appellant herein, is preparing Petition for Writ of Certiorari and will file the same on or before the expiration of three months from the date of judgment of this Court herein.

That your petitioner is arranging with the Clerk of this Court for the preparation of transcript for the Supreme Court of the United States.

Your petitioner further respectfully submits herewith a stipulation of Counsel for both parties hereto consenting to the execution of this order.

Wherefore, your petitioner respectfully prays that an order be issued by this Court staying the issuance of mandate herein pending final disposition of this cause in the Supreme Court of the United States of America.

Respectfully submitted, J. P. Punkett, R. J. Hagman, Counsel for Petitioner and Appellant.

Dated October 2, 1934.

[File endorsement omitted.]

[fol. 49] IN UNITED STATES CIRCUIT COURT OF APPEALS

STIPULATION FOR ORDER STAYING ISSUANCE OF MANDATE—Filed Oct. 3, 1934

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys that whereas Appellant is applying to the United States Supreme Court for a Writ of Certiorari, that an order may be issued by this Court staying issuance of Mandate herein pending the final disposition of this matter in the Supreme Court of the United States.

J. P. Plunkett, R. J. Hagman, Counsel for Appellant. Stanley B. Houck, Counsel for Appellee.

Dated October 2, 1934.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING ISSUANCE OF MANDATE—October 5, 1934

On consideration of Motion of Counsel for Petitioner and Appellant in the above entitled cause, and good cause therefor having been shown, and stipulation of both par-

ties to this cause consenting to this order having been filed with this Court.

It is hereby ordered, that the issuance of mandate herein be stayed pending the final disposition of this matter in the Supreme Court of the United States of America on condition that a petition for Writ of Certiorari be duly filed herein on or before the expiration of three months from September 5, 1934, the date of judgment herein.

Dated October 5, 1934.

[fol. 50] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 51] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 3, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,127. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 499. Great Northern Railway Company, Petitioner, vs. P. B. Sullivan, doing business as Alberta Coal Sales Company. Petition for a writ of certiorari and exhibit thereto. Filed October 26, 1934. File No. 499, O. T., 1934.